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No. 84-1617

In the Supreme Court of the United States

OCTOBER TERM, 1984

ALABAMA PUBLIC SERVICE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission's decision permitting Greyhound to increase its intrastate bus rates in Alabama was authorized by the Bus Regulatory Reform Act of 1982.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a) is reported at 756 F.2d 883 (Table). The decision of the Interstate Commerce Commission (ICC) (Pet. App. 2a-14a) and the underlying decision of the Alabama Public Service Commission are unreported. A subsequent decision of the ICC, denying the Alabama Public Service Commission's request for an administrative stay of the ICC's first decision pending review in the court of appeals, is unreported (App., *infra*, 1a-9a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on February 22, 1985. The petition for a writ of certiorari was filed on April 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Bus Regulatory Reform Act of 1982 (Bus Act), 49 U.S.C. 11501(e), Congress authorized the Interstate Commerce Commission to preempt state regulation of certain intrastate rate proposals of interstate bus carriers.[1] Congress found that state regulation had contributed to the financially weak condition of the bus industry in recent years. S. Rep. 97-411, 97th Cong., 2d Sess. 7-8 (1982); H.R. Rep. 97-334, 97th Cong., 1st Sess. 24 (1981). It was noted that "a large number of * * * intrastate routes * * * are cross-subsidized by more profitable interstate routes and charter operations" and that "the carrier who must cross-subsidize its intrastate route is unfairly charging its interstate travelers an inequitable price." H.R. Rep. 97-334, *supra,* at 25; see *id.* at 44; S. Rep. 97-411, *supra,* at 8-11. The Senate Report on the Bus Act also observed (*id.* at 7-8):

> An individual bus moving in interstate commerce will often pick up and carry passengers who are strictly intrastate. Thus, that vehicle is regulated by both Federal and State authorities at the same time. State regulatory restrictions on entry, exit, and/or service frequency, and slow action by State regulatory commissions on fare increases, often have significant adverse impacts on intercity bus operations. Thus, these actions impose an unreasonable burden on interstate commerce and must be preempted.

Accordingly, Congress enacted 49 U.S.C. 11501(e) to "create[] a mechanism to remedy situations where State actions are creating an unreasonable burden on interstate

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[1]States retain full authority over the rates of bus carriers owned or controlled by a state or local government and over the rates of solely intrastate carriers. Until the Bus Act was enacted, states had full authority to regulate the intrastate rates of interstate carriers as well.

commerce." H.R. Conf. Rep. 97-780, 97th Cong., 2d Sess. 52 (1982). See also S. Rep. 97-411, *supra,* at 5, 28. That Section limits state authority to review the intrastate rate proposals on interstate carriers to a 120-day period. The ICC obtains jurisdiction (49 U.S.C. 11501(e)(1)(A)):

> if * * * the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request * * *.

The provision directly at issue in this case, 49 U.S.C. 11501(e)(2)(A)(i), creates a rebuttable presumption that an intrastate bus fare imposes an unreasonable burden on interstate commerce if the ICC finds that the intrastate fare is lower than the interstate fare for comparable interstate transportation.[2] Once the carrier establishes that its intrastate fares are lower than its interstate fares for comparable transportation,[3] the burden shifts to the state or other objecting party to show that the disparity is justified. An objector may rebut the statutory presumption by demonstrating differences in operating conditions, services, or

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[2]Under Section 11501(e), a rebuttable presumption of an unreasonable burden on interstate commerce is also established by an ICC finding that (1) a carrier's revenues from the intrastate fares are less than the variable costs of providing the service, (2) the state agency failed to act on the intrastate fare request by the 120th day, or (3) the most recent intrastate general fare increase is less than the most recent general fare increase applicable to interstate traffic.

[3]Transportation may be "comparable" for purposes of the presumption not only when it involves an interstate trip of similar length to the intrastate one whose fare is at issue, but also—as here (Pet. 7)—when both trips are between the same points within the state, and the passenger who purchases the service as part of an interstate trip is charged a higher fare than the passenger, travelling on the same bus between the same points, who purchases a ticket for a purely intrastate trip. See, *e.g.,* S. Rep. 97-411, *supra,* at 9-10, setting forth specific examples where a carrier's intrastate fares were substantially (30%-40%) below the published interstate fares between the same two points.

costs between the inter- and intrastate operations sufficient to justify the disparity. *E.g.*, Pet. App. 11a, 22a-23a; App., *infra*, 7a; and *In re Greyhound Lines, Inc.*, No. MC-C-10885 (ICC Dec. 8, 1983), aff'd *sub nom. Commissioner of Transportation* v. *United States*, 750 F.2d 163, 170 (2d Cir. 1984), cert. denied, No. 84-1135 (Apr. 15, 1985). If the presumption that the lower intrastate fares burden interstate commerce is not rebutted, the ICC "shall prescribe any rate" for the intrastate transportation. 49 U.S.C. 11501(e)(1).

2. In October 1983 Greyhound Lines, Inc. (Greyhound) filed an application with the Alabama Public Service Commission (APSC) for a 20% increase in its Alabama intrastate fares. Greyhound presented evidence showing that its then existing intrastate fares ranged from 30% to 37% below the fares for the same interstate transportation between selected points in Alabama, and that with the proposed 20% increase the intrastate fares would still be 10% to 12% below the interstate fares (Pet. App. 7a-9a). Based upon that evidence, Greyhound sought to invoke the presumption under the Bus Act that intrastate fare levels that are less than comparable interstate fares unreasonably burden interstate commerce (*ibid.*).

The APSC denied the proposed increase in its entirety (Pet. App. 5a). In reaching its decision, the APSC relied on certain statistical evidence in the form of operating ratios (expenses expressed as a percentage of revenues) that purported to demonstrate that the lower intrastate fares were more profitable than the higher interstate fares (see Pet. 7; Pet. App. 8a). In addition, the APSC found that Greyhound had failed to follow Alabama law with respect to publication of tariffs on the fare reductions (*id.* at 6a).

Greyhound appealed the APSC decision to the ICC, again urging that the evidence established the presumption of a burden on interstate commerce and asking the ICC to prescribe the intrastate rates by permitting Greyhound to implement the proposed 20% increase (Pet. App. 2a-3a, 7a).

3. On May 16, 1984 (Pet. App. 2a-14a), the ICC granted Greyhound's petition and authorized the 20% increase on intrastate fares. The ICC found (*id.* at 11a) that the record "clearly establishe[d] that Greyhound's intrastate passenger fares, even at the proposed level, was significantly lower than comparable interstate fares." The issue was then whether Alabama had rebutted the statutory presumption (49 U.S.C. 11501(e)(2)(A)(i)) and the ICC found that it had not (Pet. App. 11a):

> Protestant has not shown any differences in operating conditions, services, or costs between intrastate and interstate operations that would justify the disparity in applicable fares and rebut the statutory presumption.

With respect to the operating ratio comparisons relied upon by the APSC to demonstrate that the lower intrastate rates were actually more profitable than the interstate rates, the ICC rejected the evidence as insufficiently reliable to rebut the statutory presumption. Pet. App. 11a-12a, 15a-33a, citing *In re Greyhound Lines, Inc.*, No. MC-C- 10901 (ICC Apr. 13, 1984), aff'd *sub nom. Public Service Commission* v. *ICC*, 749 F.2d 32 (4th Cir. 1984) (Table). Subsequently, in denying the APSC's petition for an administrative stay pending judicial review, the ICC elaborated on its reasons for rejecting the evidence (App., *infra*, 7a):

> In this proceeding, the operating ratio calculations relied upon by the APSC allocated costs strictly on the basis of passenger miles. Since 22 percent of the passenger miles were generated by intrastate passengers,

> 22 percent of the expenses were allocated to intrastate service. However, it is well established that total operating unit costs generally decline with length of haul. Because certain costs (such as ticketing, baggage handling, and station expenses) do not vary proportionately with the length of the trip, costs per mile for shorter, intrastate trips are typically higher than those for longer, interstate trips.

The faulty allocation method, the ICC pointed out (*ibid.*), would lead to the anomalous result that "the lower intrastate rates charged by Greyhound appear more profitable than the higher rates charged on interstate traffic on the same buses." The ICC concluded (*ibid.*):

> There is no explanation in the record for this result other than the faulty cost and/or revenue allocation method relied upon by the State. The APSC submitted no evidence explaining this result based upon differences in the operating characteristics of intrastate versus interstate traffic. Ultimately, APSC failed to demonstrate any factors or conditions peculiar to the Alabama intrastate movements that would justify lower intrastate fares and rebut the presumption.

In addressing (App., *infra*, 8a) the APSC's alternative argument that the fare increase prescribed by the Commission was without a rational basis, the ICC held that the record was "more than adequate to demonstrate that Greyhound's 20% increase was reasonable in the context of eliminating the presumptive burden on interstate commerce." The ICC pointed out (*id.* at 9a (footnote omitted)) that the rate increase

> does not even bring the intrastate fares up to the comparable interstate fare level, and we believe that fact alone is an adequate basis under Section 11501(e) for prescribing the intrastate fare increase sought by

Greyhound. In the absence of any evidence or basis for prescribing a lower fare, Greyhound is entitled to the increase proposed.

On APSC's petition for judicial review, the Eleventh Circuit summarily affirmed the Commission by judgment order.

ARGUMENT

The judgment below is consistent with the congressional mandate in the Bus Act to relieve interstate bus carriers of discriminatory state regulation, and is consistent with prior ICC decisions under the same legislation. Moreover, the Eleventh Circuit's summary affirmance of the ICC's decision is consistent with the decisions of two other courts of appeals that have reviewed ICC decisions under the Bus Act. In one of those, *Commissioner of Transportation* v. *ICC*, 750 F.2d 163 (2d Cir. 1984), cert. denied, No. 84-1135 (Apr. 15, 1985), this Court recently denied a petition for a writ of certiorari in which petitioners raised substantially the same issue raised here.

1. Petitioner's principal argument (Pet. 14-20) is that the ICC and the court of appeals failed to follow certain criteria established by this Court for determining, on a case-by-case basis, when intrastate fares unreasonably burden interstate commerce. More specifically, petitioner contends that this Court has created a requirement that the expenses and revenues of a regulated industry be allocated between intrastate and interstate services as a prerequisite to a finding that state regulation is unduly burdensome (*id.* at 15-16), except where conditions are substantially the same (*id.* at 18). Thus, petitioner suggests (*id.* at 17), the ICC erred in "refus[ing] to consider operating ratios because they involve the allocation of expenses."

a. The principal error in petitioner's analysis lies in the assumption that this Court's earlier decisions addressing

specific issues in the federal preemption of state *rail* ratemaking decisions under former Section 13(4) of the Interstate Commerce Act (49 U.S.C. (1976 ed.))[4] apply to the exercise of the ICC's current authority under the Bus Act. Those decisions are inapposite however, because the Bus Act established a specific procedural and substantive mechanism for making the determination whether intrastate bus fares unreasonably burden interstate commerce.

In each of the rail rate cases under former Section 13(4) relied upon by petitioner (Pet. 15), the central issue concerned the nature and adequacy of the ICC's factual findings leading to its ultimate conclusion that the intrastate rail rates constituted a burden on interstate commerce.[5] By

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[4] *Public Service Commission* v. *United States,* 356 U.S. 421 (1958) (challenge to ICC order preempting state holddown on intrastate rail rates); *Chicago, M., St. P. & Pac. R.R.* v. *Illinois,* 355 U.S. 300 (1958) (same); *King* v. *United States,* 344 U.S. 254 (1952) (same); and *North Carolina* v. *United States,* 325 U.S. 507 (1945) (same). Congress amended that statute to strengthen the ICC's hand in exercising jurisdiction over intrastate rail rates in the Transportation Act of 1958, Pub. L. No. 85-625, § 4, 72 Stat. 570. See, *e.g.,* S. Rep. 1647, 85th Cong., 2d Sess. 19-21 (1958). Then Section 214 of the Staggers Rail Act of 1980, 49 U.S.C. 110501(b)-(d), vested the ICC with still more expansive preemptive authority over intrastate rail rates. Recognizing the effect of these statutory changes, several lower courts have found that decisions petitioner relies on are no longer controlling, even in rail ratemaking cases. See *Commissioner of Transportation,* 750 F.2d at 169; *Utah Power & Light Co.* v. *ICC,* 747 F.2d 721, 736 (D.C. Cir. 1984); *Texas* v. *United States,* 730 F.2d 339 (5th Cir. 1984), cert. denied, No. 83-2101 (Oct. 9, 1984); *Kentucky Utilities Co.* v. *ICC,* 721 F.2d 537, 542-543 (6th Cir. 1983); cf. *Wheeling-Pittsburgh Steel Corp.* v. *ICC,* 723 F.2d 346 (3d Cir. 1983).

[5] *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 831 (1945), involved an order of the Federal Power Commission under the Natural Gas Act, and, like the rail cases relied upon by petitioner, focused on the adequacy of the agency's factual findings and methodology. Similarly, in those very early cases involving allegations of confiscatory state telephone rate regulation (*Smith* v. *Illinois Bell Telephone Co.,* 282 U.S. 133 (1930)), the central issues concerned the appropriate methods and findings adequate to support a finding of discriminatory state regulation.

contrast, in this case under the Bus Act, the finding of a burden on interstate commerce is premised on a statutory presumption that, as petitioner concedes, was properly triggered. See Pet. 7-8; Pet. App. 8a-9a. Thus there can be no dispute here about the adequacy of findings to support the presumption; the issue in this case is whether the evidence relied upon by the APSC was sufficient to overcome the statutory presumption of a burden on interstate commerce and, on that issue, the decisions relied on by petitioner are not controlling.

b. Petitioner's argument regarding the allocation of expenses and revenues[6] ignores the substantial attention the ICC has devoted to the issue, in its decisions here (Pet. App. 11a-12a; App., *infra*, 5a-8a) and prior cases (see *e.g.*, Pet. App. 22a-31a, and authorities cited), particularly as it affects the calculation of operating ratio evidence. As have other state authorities in the past, the APSC seeks to rely on such evidence as a short cut to demonstrate that lower intrastate bus fares can be justified simply because the operating ratio shows the intrastate service to be more profitable than the interstate, even though the interstate fare level is higher. The ICC is under no obligation to accept such evidence uncritically, and has consistently refused to accept the anomalous results of such evidence as sufficient

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[6]Contrary to petitioner's suggestion (Pet. 15), we do not read this Court's decisions as establishing a general requirement that an allocation of expenses and investment be made as a prerequisite to demonstrating that intrastate rate levels impose an unreasonable burden on interstate commerce, in this context or any other. In any event, the Bus Act creates a presumption of a burden on interstate commerce that is triggered whenever any of four factual situations are shown to exist, including where the state has taken no action for 120 days (49 U.S.C. 11501(e)(2)(A)(iii)), or where general increases in intrastate fares have been held below the level of general increases in interstate fares (49 U.S.C. 11501(e)(2)(B)). Neither showing requires any allocation of expenses.

to rebut the statutory presumption. The ICC has pointed out (*e.g.*, Pet. App. 24a) that interstate and intrastate service are ordinarily identical,[7] with the same personnel providing the same service simultaneously with the same equipment; that methods of allocating costs in such situations are inherently arbitrary (*ibid.;* App., *infra,* 6a-7a);[8] and that the anomalous result of the lower intrastate fares appearing to be more profitable than the higher interstate fares is explained by arbitrary or faulty allocation of costs and revenues between the two kinds of service. See App., *infra,* 7a (operating ratios relied upon by Alabama were premised on an allocation method that applied only one variable—passenger miles—despite the fact that it is well-established that many costs do not vary proportionately with mileage). The ICC's explanation for refusing to accept such evidence as sufficient to rebut the statutory presumption has been affirmed by two courts of appeals, *Commissioner of Transportation* v. *United States,* 750 F.2d at 170;[9]

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[7]Petitioner's belated reliance here (Pet. 18-19) on one questionable example of how the conditions on intrastate and interstate service may differ should be disregarded by the Court. If the intrastate operations between Birmingham and Anniston are substantially different from the interstate service provided, and if the differences are typical of the differences between intrastate Alabama operations and interstate bus operations, so as to render the presumption under Section 11501(e)(2)(B) either rebutted or inapplicable because the intrastate and interstate operations are not comparable, then that argument should have been made to the ICC. It was not and therefore is not properly before this Court. See *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council,* 435 U.S. 519, 553-554 (1978); *United States* v. *L.A. Tucker Lines, Inc.,* 344 U.S. 33, 36-37 (1952).

[8]Even in the railroad industry, operating ratio evidence long has been regarded as suspect because of the difficulties in allocating expenses between operations. See generally the dissent in *Public Service Commission* v. *United States,* 356 U.S. 421, 429-463 (1958) (Frankfurter, J.).

[9]Petitioner argues (Pet. 23-24) that the *Commissioner of Transportation* case is not persuasive because, inter alia, "the intrastate operating

Public Service Commission v. *ICC*, 749 F.2d 32 (4th Cir. 1984) (Table); cf. *Texas* v. *United States*, No. 84-4184 (5th Cir. May 28, 1985), slip op. 4455-4456 (affirming ICC's similar rationale rejecting evidence based on revenue per passenger mile; remanded on other grounds).

Contrary to petitioner's suggestion (Pet. 20), the ICC's rejection of the operating ratio evidence does not render the statutory presumption irrebuttable. It does, however, preclude sole reliance on operating ratios, without explanation, to rebut the presumption. The proper way to rebut the presumption, the ICC has explained, is to point to differences in operating conditions, services, or costs that would justify or explain holding down intrastate bus fare levels (Pet. App. 11a-12a).

In the final analysis, petitioner is merely quarrelling with Congress's decision to put the burden on state authorities to demonstrate that lower intrastate rate levels are justified. Accordingly, its argument should be addressed to Congress and not to the courts.

2. Petitioner also argues (Pet. 20-22) that the ICC's order conflicts with decisions of this Court that require a rational basis and evidence to support the rates prescribed. The argument is insubstantial. The Act requires the ICC to prescribe *any* rate if the presumption that intrastate rates impose an unreasonable burden stands unrebutted. As the ICC explained (App., *infra*, 9a), where the increase sought by the carrier does not raise intrastate rates even to the level

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ratio was higher" in that case. The distinction is unimportant. The court of appeals adopted the ICC's general reasoning regarding operating ratio evidence. 750 F.2d at 170.

of the comparable interstate fares, and the state has provided no evidence or basis for prescribing lower intrastate fares, the carrier is entitled to the proposed fares.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10]Petitioner also seeks to raise in this Court a question relating to the power of a state commission to require the filing of a rate reduction for intrastate travel. That issue was not raised in Greyhound's appeal to the ICC and was not addressed by the court of appeals. Thus, although the ICC decision refers to this question (Pet. App. 6a n*) the record does not preserve the issue in a manner suitable to disposition by this Court.

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-10904

PETITION OF GREYHOUND LINES, INC. FOR REVIEW OF A DECISION OF THE ALABAMA PUBLIC SERVICE COMMISSION PURSUANT TO 49 U.S.C. 11501

Decided: September 4, 1984

By decision served May 21, 1984, we authorized Greyhound Lines, Inc. to increase its intrastate passenger fares in Alabama by 20 percent. The approved fares and rates became effective on June 1, 1984. On that same date, the Alabama Public Service Commission (APSC or State) filed a petition requesting us to stay our May 21 decision pending judicial review. Greyhound filed a reply. Subsequently, on June 12, 1984, the APSC filed a petition for judicial review of our decision with the United States Court of Appeals for the Eleventh Circuit,[1] along with an Emergency Motion for stay of our decision. The court denied the motion of June 12.

In its petition, the APSC contends that a stay is warranted in the circumstances. First, the State asserts that it is likely to prevail on the merits of its court appeal because our decision is contrary to case law and the Bus Regulatory Reform Act of 1982 (Bus Act).[2] The APSC also argues that,

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[1] *Alabama Public Service Commission* v. *ICC and USA*, No. 84-7374 (11th Cir., filed June 12, 1984).

[2] In this context, APSC relies on several cases (*North Carolina* v. *United States*, 325 U.S. 507 (1945), *Public Service Commission of Utah*, 356 U.S. 421 (1958)) in which the Supreme Court, in a closely divided decision, established particularly stringent standards for Commission decisions setting intrastate rail rates in cases involving discrimination

without a stay, the public will be irreparably injured because the bus-riding public in towns served exclusively by Greyhound would, in light of the 20 percent increase and reduced Greyhound rates at non-exclusive points, be charged fares at least 30 percent higher than passengers at non-exclusive points. It adds that while this rate disparity is in effect, members of the public at these exclusive points will assertedly incur unrecoverable additional costs for bus transportation and, in fact, the disparity may well cause some individuals to forego travel or to travel by a less convenient mode. The State also asserts that a stay would not substantially harm Greyhound because the carrier currently realizes substantial net income on its Alabama intrastate service. Finally, the APSC contends that, in considering all of these factors, the public interest favors a grant of the stay.

In reply, Greyhound contends that the APSC's request for a stay is too late inasmuch as the rate increase has already been implemented where competitive conditions permit. It adds that the belated granting of a stay would not only perpetuate the discrimination and unreasonable burden imposed on interstate passengers which have persisted for so long under Alabama's regulatory ratemaking regime, but also financially harm its already unprofitable

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against interstate commerce under former Section 13(4) of the Act, 49 U.S.C. 13(4). Those cases are not controlling here. Both antedate enactment of significant statutory reforms designed to *facilitate* Commission decision-making in cases involving intrastate *rail* rates (*see e.g.*, Pub. L. 85-625, § 4, 72 Stat. 570 (1958); Pub. L. 96-448, § 214, 94 Stat. 1913 (1980)), and do not of course address the very specific new statutory provision of the Bus Act under which the Commission is acting in this case. The statutory scheme established by Congress under 49 U.S.C. 11501(e) recasts the prior federal/state scheme for regulation of the bus industry, by providing specific substantive standards and procedures for eliminating burdensome state regulation, and thereby renders those earlier decisions inapposite.

nationwide and Alabama intrastate operations. Moreover, Greyhound contends that, since the rate increase has already been implemented, the State's belated request will not maintain the status quo, but, rather, will work a hardship on it by depriving it of needed revenues and compel it to roll back rates from current levels. Finally, Greyhound argues that our conclusion that it has established conclusively the comparative rate presumption at 49 U.S.C. 11501(e)(2)(A)(i) was proper in all respects.[3]

As we pointed out in our stay decision in No. MC-C-10901, *Petition of Greyhound Lines, Inc. for Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. 11501*, served June 25, 1984, a stay of an agency action pending judicial review is an extraordinary action that should not be taken except in the most unusual situations. *Middlewest Motor Freight Bureau* v. *United States*, 443 F.2d 212, 242 (8th Cir. 1970). A stay is not a routine action taken simply because an agency action alters the *status quo*; if that were the rule, most agency actions would be stayed pending judicial review. Cf. *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301 (1976) (Opinion of J. Rehnquist in chambers). Rather, as the United States Court of Appeals for the Fourth Circuit and other courts have held, a party seeking a stay pending judicial review of an agency action must establish: (1) that it will suffer irreparable harm absent a stay, (2) that a stay will not substantially harm other parties, (3) that it has a substantial likelihood of prevailing on the merits, and (4) that the public interest favors a stay. *Blackwelder* v. *Seilig*, 550 F.2d 189, 194 (4th Cir. 1977); *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259

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[3]Subsection 11501(e)(2)(A)(i) establishes a rebuttable presumption that a prescribed rate, rule, or practice applicable to intrastate transportation of passengers unreasonably burdens interstate commerce if it results in the carrier charging an intrastate rate which is lower than the rate applicable to comparable interstate service.

F.2d 921 (D.C. Cir. 1958). The APSC has met none of these criteria, as discussed below. Accordingly, we will not stay our decision.

Regarding irreparable harm, the burden of demonstrating such harm is heavy, because a stay is an extraordinary and drastic remedy. *Canal Authority of State of Florida* v. *Callaway*, 489 F.2d 567, 572-573 (5th Cir. 1974). The *Virginia Petroleum* court said of the requirement of irreparable injury (259 F.2d at 925, emphasis in original): "The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy . . . are not enough."

In applying that standard here, we conclude that the State has failed to satisfy its evidentiary burden. First, the APSC's argument regarding unrecoverable additional costs involves the very kind of mere monetary loss that has generally been held insufficient to establish irreparable harm. We also reject the State's characterization of these costs as "unrecoverable." As we stated in our stay decision in No. MC-C-10901, *supra*, while it may be impractical and costly to order restitution to each individual passenger who travels by Greyhound pending judicial review, there are numerous ways to fashion a remedy for any overcharges that may have been imposed on the public. Finally, we find no merit in State's unsubstantiated claim that some persons may have to change their travel plans as a result of our approving the fares increase sought here. In any event, however, because Greyhound has established that its existing intrastate passenger fares unreasonably burden and discriminate against interstate commerce, we conclude that even if some harm to certain individuals were to result from the increase, that harm would clearly be outweighed by the benefits to the bus-riding public in general from removal of this unreasonable burden and discrimination.

Conversely, were we to stay our decision and ultimately prevail on review, Greyhound would be deprived of much-needed additional intrastate revenues that it was lawfully entitled to, but could never recover. Moreover, the existing rate structure would continue to unreasonably burden interstate commerce, thereby prolonging interstate customers' cross-subsidization of intrastate services. As we explained in our prior decision, maintaining this rate disparity results in a subsidization of Greyhound's Alabama intrastate operations by its Alabama interstate operations. This is exactly the type of cross-subsidization of transportation costs that Congress sought to eliminate through the enactment of Section 17 of the Bus Act [49 U.S.C. 11501(e)]. In addition, a stay would increase the chances that Greyhound's investment and service decisions, based on the existing, skewed rate structure, will result in inefficient allocation of resources contrary to the national transportation policy. See, e.g., 49 U.S.C. 10101(a)(2)(C) and (D). Accordingly, because Greyhound, and not the public, could be seriously harmed by the imposition of a stay here, we conclude that the APSC has not met its evidentiary burden as to this criterion.

Finally, the APSC has not established that it is likely to succeed on the merits. Section 17 of the Bus Act establishes a rebuttable presumption that intrastate rates impose an unreasonable burden on interstate commerce if the bus carrier shows that its intrastate rates are lower than the rates it charges for comparable interstate transportation [Section 11501(e)(2)(A)(i)]. The APSC conceded in its pleadings before the Commission that Greyhound has invoked the statutory presumption by establishing that its Alabama intrastate rates are lower than its interstate rates for comparable transportation, thereby requiring the State to rebut the presumption. Thus, the sole issue before us was whether the evidence presented by the APSC was sufficient to rebut the statutory presumption. We concluded that it was not.

The sole evidence relied upon by the APSC in this proceeding to rebut the rate disparity presumption was various operating ratio calculations. The operating ratios introduced by the State for Greyhound's Alabama intrastate operations were 90.39 percent before the increase and 84.91 percent after, versus a 101.28 percent operating ratio for the carrier's combined intrastate-interstate Alabama operations. The APSC contended that these operating ratios established that Greyhound's intrastate operations are not only profitable at current fare levels, but, in fact, are more profitable than its interstate operations and are actually subsidizing those operations.[4] The APSC, therefore, concluded that such ratios effectively rebut the statutory presumption that Greyhound's intrastate rates are unreasonably burdening interstate commerce.

However, because the operating ratio evidence relied upon by the APSC in this case was inherently flawed for the same reasons as that relied upon by the WVPSC in No. MC-C-10901, *supra*, we concluded that APSC's operating ratios were not, in fact, sufficiently reliable to rebut the statutory presumption raised by the rate discrepancies. As we explained in our stay decision in No. MC-C-10901, *supra*, where intrastate and interstate operations are the *same* (i.e., performed on the same bus), it is impossible to

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[4]As discussed below, we do not believe the evidence of profitability, based solely upon operating ratios, is valid because of the arbitrary means of allocating expenses between intra-and interstate traffic. In any event, the fact that intrastate rates at the pre-existing level may have been "profitable" in the sense that revenues exceed expenses, standing alone, is not controlling here. APSC was required to demonstrate the reasonableness of the disparity between the intrastate fares and the higher interstate fares by identifying differences in operating conditions, services, or costs between interstate and intrastate operations that would explain and justify the lower intrastate fare level; it failed to do so, as subsequently discussed.

allocate costs between intrastate and interstate operations in a non-arbitrary manner.[5]

In this proceeding, the operating ratio calculations relied upon by the APSC allocated costs strictly on the basis of passenger miles. Since 22 percent of the passenger miles were generated by intrastate passengers, 22 percent of the expenses were allocated to intrastate service. However, it is well established that total operating unit costs generally decline with length of haul. Because certain costs (such as ticketing, baggage handling, and station expenses) do not vary proportionally with the length of the trip, costs per mile for shorter, intrastate trips are typically higher than those for longer, interstate trips. As shown in Greyhound's Exhibit 6A, these kinds of costs, not clearly related to mileage, make up a significant portion of the carrier's operating costs. The cost allocation method used to compute the operating ratios relied upon by the APSC did not adjust for these factors. Indeed, this faulty analysis leads to an anomalous result in this case: the lower intrastate rates charged by Greyhound appear more profitable than the higher rates charged on interstate traffic on the same buses. There is no explanation in the record for this result other than the faulty cost and/or revenue allocation method relied upon by the State. The APSC submitted no evidence explaining this result based upon differences in the operating characteristics of intrastate versus interstate traffic. Ultimately, APSC failed to demonstrate any factors or conditions peculiar to the Alabama intrastate movements that would justify lower intrastate fares and rebut the presumption.

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[5]We have consistently held in prior bus rate cases that the mere citation of aggregate ratios such as *intrastate* operating ratios or revenue per passenger mile is not sufficient to meet the burden of proof in rebutting the statutory presumption of undue burden. For such evidence to be sufficient, the objectors must show that they have adequately accounted for differences in important transportation characteristics between intrastate and interstate service.

Under these circumstances, we concluded that the State had failed to carry its burden of proof. Consistent with our recent decisions in other similar cases, we concluded that the operating ratios relied upon by the APSC, standing alone, were not sufficient to overcome the statutory presumption that the Alabama intrastate rates charged by Greyhound impose an unreasonable burden on interstate commerce. *See*, e.g., No. MC-C-10893, *Petition of Greyhound Lines, Inc., For Review of A Decision of The Railroad Commission of Texas Pursuant to 49 U.S.C. 11501* (not printed), served February 21, 1984.

Finally, APSC argues that we erred in prescribing the 20 percent increase in Alabama intrastate fares (based upon the Greyhound proposal) because the figure is without a rational basis. Under the statute, Section 11501(e)(1), we are directed to "prescribe any rate" for intrastate transportation if (1) a State has denied a carrier request to establish a particular rate, and (2) we find that "the rate in effect and applicable" causes unreasonable discrimination against or imposes an unreasonable burden on interstate commerce. With those prerequisites established here, we were obligated to "prescribe" rates. Although the record in this case was not adequate to enable us to prescribe the precise level of intrastate rates that would yield revenues sufficient for Alabama intrastate traffic to cease burdening interstate commerce and to contribute precisely its "fair share" — an unrealistic and unattainable standard which we do not believe Congress contemplated that the Commission would undertake in the 60-day period permitted under Section 11501(e) — the record was more than adequate to demonstrate that Greyhound's 20 percent increase was reasonable in the context of eliminating the presumptive burden on interstate commerce here. In Section 11501(e)(2)(A), Congress has essentially made a legislative finding that, unless the disparity is justified and shown reasonable, lower intrastate fares constitute such a burden on interstate commerce.

See generally S. Rep. No. 97-411, 97th Cong., 2d Sess. 7-8 (1982); H. Rep. No. 97-334, 97th Cong., 1st Sess. 25-26, 44 (1982). Here, the 20 percent increase does not even bring the intrastate fares up to the comparable interstate fare level, and we believe that fact alone is an adequate basis under Section 11501(e) for prescribing the intrastate fare increase sought by Greyhound. In the absence of any evidence or basis for prescribing a lower fare, Greyhound is entitled to the increase proposed.[6] Accordingly, we do not believe that the APSC has shown any substantial likelihood that it will prevail on the merits.

For all of these reasons, we find that the public interest and a balancing of the equities do not favor issuance of an administrative stay in this proceeding. Accordingly, we conclude that the petition should be denied.

It is ordered:

The petition for a stay is denied.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterratt and Gradison.

James H. Bayne
Secretary

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[6]In a proceeding under Section 11501(e), where the carrier successfully relies on the presumption under subsection (e)(2)(A)(i), the reasonableness of the comparable interstate fares is normally not at issue, either in the State proceeding or before the Commission. For that reason, an analysis and review of the reasonableness of the interstate rate level is not normally made. If any person believes that the fare level for the "comparable interstate transportation of passengers" under subsection (e)(2)(A)(i) is itself unreasonable, they may file a formal complaint with the Commission under 49 U.S.C. 11701.